

Elin Jones AM
Llywydd

17 April 2018

Annwyl Lywydd

Scrutiny of regulations made under the European Union (Withdrawal) Bill

I enclose a copy of a letter I have today sent to the First Minister regarding the National Assembly's decision on 7 March to endorse recommendations 1, 2, 4 and 7 in the Constitutional and Legislative Affairs Committee's recent report ("the report") on the **Scrutiny of regulations made under the European Union (Withdrawal) Bill** ("the Bill"). You wrote to the Secretary of State on 22 March notifying him of the Assembly's decision.

Our concerns have arisen as a result of the First Minister's letters to the Secretary of State dated 5 February and 29 March, as well as the formal response to the report from the Leader of the House and Chief Whip, dated 27 March. For ease of reference, the correspondence referenced can be found as annexes to this letter.

We consider that the matters outlined in the letter to the First Minister raise serious constitutional concerns, because it would appear that the prerogative of the legislature is being undermined. It is for that reason that I thought it appropriate to draw this correspondence to your attention.

Yours sincerely,



Mick Antoniw

Chair

Croesewir gohebiaeth yn Gymraeg neu Saesneg.

We welcome correspondence in Welsh or English.



Rt Hon Carwyn Jones AM
First Minister

17 April 2018

Dear First Minister

Scrutiny of regulations made under the European Union (Withdrawal) Bill

I am writing in relation to the Constitutional and Legislative Affairs Committee's recent report ("the report") on the Scrutiny of regulations made under the European Union (Withdrawal) Bill ("the Bill").

In particular, I would like to raise with you matters relating to your letter to the Secretary of State dated 5 February, the plenary debate on the report held on 7 March, the formal response to the report from the Leader of the House and Chief Whip dated 27 March, and your 29 March letter to the Secretary of State for Wales that relates both to the report on the Bill and its sifting committee provisions.

You will be aware that our inquiry and subsequent report considered the appropriateness of the scope and nature of delegated powers provided in to the Bill to UK and Welsh Ministers, and the procedures to be used to scrutinise that delegated legislation. Given the Bill's passage through the House of Lords, the report focused on amendments we believed should be made to the Bill, and addressed questions which were raised by the Secretary of State in a letter to the Llywydd on 16 January.

Our report made seven recommendations, four of which recommended amendments to the Bill. For that reason, we believed it appropriate to seek the National Assembly's views on those recommendations, and the motion asking the National Assembly to note the committee report also requested that it endorse recommendations 1, 2, 4 and 7.



On 7 March, the motion was agreed without objection and the National Assembly offered unanimous support for those recommendations. Consequently, on 22 March, the Llywydd wrote to the Secretary of State for Wales drawing his attention to those recommendations and asking that he receive the letter as formal notification of the National Assembly for Wales's position on what amendments should be made to the Bill in respect of procedures for the scrutiny of subordinate legislation made under its provisions.

In light of the events and correspondence I refer to above, I would like to seek clarification from you on the reasons for the approach the Welsh Government has adopted. In particular I would be grateful if you could explain why, having advised in your letter to the Secretary of State of 5 February that matters relating to the sifting committee were for the National Assembly to determine, you subsequently wrote to the Secretary of State for Wales on 29 March rejecting a recommendation endorsed by the National Assembly about the operation of that sifting committee. That endorsement by the National Assembly was unanimous and included support from the Welsh Government.

I recognise that during the plenary debate the Leader of the House told the National Assembly that the Welsh Government was reserving its position on recommendation 2 pending thorough consideration. However, the Leader of the House had not sought to amend the motion to reflect that position, which, as previously stated, was then unanimously endorsed.

Without prejudicing the will of any Government, the National Assembly for Wales should not find itself in a position where it expresses a formal, all party position which is then subsequently, and very soon after, called into question within correspondence of which the Assembly is not aware. As I am sure you will appreciate, as a committee, we are concerned generally at the transfer of power from legislatures to executives. The approach the Welsh Government has adopted on these matters undermines the prerogative of the legislature.

I look forward to hearing from you at the earliest opportunity. I am writing to the Llywydd separately on this matter.



This letter is copied to Julie James AM, Leader of the House and Chief Whip.

Yours sincerely,

A handwritten signature in black ink that reads "Mick Antoniw". The signature is written in a cursive style with a horizontal line underneath the name.

Mick Antoniw

Chair

Croesewir gohebiaeth yn Gymraeg neu Saesneg.

We welcome correspondence in Welsh or English.



Y Gwir Anrh/Rt Hon Carwyn Jones AC/AM
Prif Weinidog Cymru/First Minister of Wales



Llywodraeth Cymru
Welsh Government

Ein cyf/Our ref: MA-L/FM/0044/18

Rt Hon Alun Cairns MP
Secretary of State for Wales
Gwydyr House
London
SW1A 2NP

5th February 2018

Dear Alun

I am writing in response to your letter of 16 January, in respect of the European Union (Withdrawal) Bill.

I was very disappointed that there were no agreed amendments to Clause 11 during Commons consideration, but I note your commitment to bring forward amendments in the House of Lords. It is of course essential that these amendments are agreed with the Welsh and Scottish Governments, and I know that discussions at official level are continuing.

I also note the Government amendments to clauses 7 and 10. I welcome the replacement of the requirement for consent of UK Ministers with a requirement for consultation in relation to the powers in clause 7, although I note that the same amendment has not been made in clauses 8 and 9, and I am not clear about the reasoning for the retention of these restrictions. (I am in any event aware of the House of Lords Constitution Committee's recommendation that clause 9 be omitted from the Bill). I also welcome the amendments enabling Welsh Ministers to modify directly applicable EU law in areas of devolved competence, although I also note they are based on an assumption that Clause 11 will continue in its current form, which will not be acceptable to the Welsh Government or to the Assembly; the official level discussions must produce a better solution.

I have considered the specific questions in your letter in respect of the Committee stage amendments of the Bill. In respect of the statutory requirement to produce explanatory material alongside SIs made under the relevant powers in Schedule 2 of the Bill, the information envisaged to be included in the statements is material that we would expect to provide in any event. I therefore have no strong view as to whether such a requirement should be placed on the face of the Bill; but I am aware that the Constitution Committee has made further recommendations about the content of supportive explanatory material. If the UK Government is minded to accept these, I will need to consider the Welsh position afresh. I would be grateful to be kept informed of your developing thinking in respect of that

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recommendation, and in respect of the applicability of the requirements to SIs made under the joint procedure.

In respect of the requirement to submit negative resolution SIs to a 'sifting' committee, I consider that this is properly a matter for the National Assembly for Wales to determine, as is the applicability of this requirement to SIs made under the joint procedure.

In respect of the "made affirmative" procedure, our view is that in principle this should be available to Welsh Ministers and the Assembly, to match the flexibility available to UK Ministers.

Finally, our officials have also been discussing the correction of deficiencies in the Government of Wales Act 2006. I welcome the commitment to use Orders in Council to make correcting amendments which fall outside competence. I have considered the various means by which the small number of deficiencies which are within our competence might be corrected, and I believe the best solution in this case would be for the corrections to be made by the Withdrawal Bill. I have asked my officials to work with yours to develop the necessary amendments.

I am copying this to the Presiding Officer, the Chair of the Assembly's External Affairs and Additional Legislation Committee, the Chair of the Assembly's Constitutional and Legislative Affairs Committee and to the Chair of the Welsh Affairs Committee in Parliament.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Carwyn Jones', written in a cursive style.

CARWYN JONES

Y Gwir Anrh/Rt Hon Carwyn Jones AC/AM
Prif Weinidog Cymru/First Minister of Wales



Llywodraeth Cymru
Welsh Government

Rt Hon Alun Cairns MP
Secretary of State for Wales
Gwydyr House
London
SW1A 2NP

29th March 2018

Dear Alun

I am writing in response to your letter of 16 March 2018 about changes to the European Union (Withdrawal) Bill. I note the summary of the changes you intend to make to the Bill at Lords Report, and the progress in respect of other matters, including the correction of within competence deficiencies in the Government of Wales Act 2006, the correction to the technical standards reservation, and your proposal in respect of enhanced explanatory material.

You raise a specific question in respect of the 'sifting committee' provisions, with reference to the recommendation of the Constitutional and Legislative Affairs Committee that the provisions should apply to instruments laid before the Assembly, and that the sifting committee's recommendation on the appropriate procedure should be binding. The Welsh Government's view is that it would be appropriate for the sifting committee provisions as set out in the Bill to apply to instruments laid before the Assembly.

However, we are not persuaded that the recommendation made by the sifting committee should be binding. It is right that the exercise of delegated powers should be subject to appropriate and proportionate scrutiny and I expect that in the vast majority of cases Welsh Ministers will accept the recommendation of the sifting committee. However, there may be situations where – for reasons of urgency – Welsh Ministers will need to act more quickly than the affirmative procedure provides for, and it is essential the government retains the flexibility to do so, notwithstanding the recommendations of the sifting committee. We also believe there is a strong case for maintaining consistent arrangements between the National Assembly and the UK Parliament.

I can also confirm that we have no other proposed changes to the scrutiny arrangements for the Welsh Ministers' powers.

I am copying this letter to the Presiding Officer and to the Chair of the Assembly's Constitutional and Legislative Affairs Committee.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Carwyn Jones', written in a cursive style.

CARWYN JONES

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We welcome receiving correspondence in Welsh. Any correspondence received in Welsh will be answered in Welsh and corresponding in Welsh will not lead to a delay in responding.

Annexe 4 - Formal response to the report from the Leader of the House and Chief Whip,
dated 27 March

Julie James AC/AM
Arweinydd y Tŷ a'r Prif Chwip
Leader of the House and Chief Whip



Llywodraeth Cymru
Welsh Government

Ein cyf/Our ref MA/L/JJ/ 0198/18

Mick Antoniw AM/AC
Chair
Constitutional and Legislative Affairs Committee
National Assembly for Wales
CF99 1NA

27 March 2018

Dear Mick

I am writing to notify you of the Welsh Government's formal response to the Committee's recent report on the scrutiny of regulations made under the European Union (Withdrawal) Bill. I attach a table which sets out our response to each recommendation.

I am grateful to the Committee for their work on this matter.

Yours sincerely,

A handwritten signature in blue ink that reads "Julie". The signature is written in a cursive style with a large initial 'J'.

Julie James AC/AM
Arweinydd y Tŷ a'r Prif Chwip
Leader of the House and Chief Whip

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We welcome receiving correspondence in Welsh. Any correspondence received in Welsh will be answered in Welsh and corresponding in Welsh will not lead to a delay in responding.

**Welsh Government response to the Constitutional and Legislative Affairs Committee
- Scrutiny of regulations made under the European Union (Withdrawal) Bill**

Recommendation	Response
<p>Recommendation 1. We recommend that the sifting mechanism currently included in the Bill should be extended to cover all regulations that are made under the Bill and are laid before the National Assembly, and that a committee of the National Assembly is responsible for making a recommendation as to the appropriate procedure for the regulations.</p>	<p>AGREE: This is properly a matter for the Assembly to consider and agree with the UK Government and Parliament. The Welsh Government agrees that the exercise of delegated powers should be subject to appropriate and proportionate scrutiny. We also believe that, in respect of the provisions relating to the exercise and scrutiny of delegated powers, the powers and duties on Welsh Ministers should be in line with those which apply to UK Ministers. Therefore, the Welsh Government would be content for equivalent sifting requirements to apply to instruments laid before the Assembly, as to instruments laid before Parliament.</p>
<p>Recommendation 2. The recommendation made by the sifting committee under recommendation 1 should be binding, save where the National Assembly resolves otherwise. This requirement should be reflected on the face of the Bill.</p>	<p>REJECT: The Welsh Government recognises this is primarily a matter for the National Assembly to consider and agree with the UK Government and Parliament. However, we are not persuaded that the recommendation made by the sifting committee should be binding.</p> <p>We agree that the exercise of delegated powers should be subject to appropriate and proportionate scrutiny and we have demonstrated our commitment to robust scrutiny through the approach we have taken in the LDEU Bill. We also believe that in the vast majority of cases Welsh Ministers will accept the recommendation of the sifting committee that a set of regulations should be subject to the affirmative procedure rather than negative procedure.</p> <p>However, there may be situations where – for reasons of urgency – Welsh Ministers will need to act more quickly than the affirmative procedure provides for, and it is essential the government retains the flexibility to do so, notwithstanding the recommendations of the sifting committee.</p> <p>The Welsh Government also believes there is a case for maintaining consistent arrangements between the National Assembly and the UK Parliament, particularly for joint and composite instruments where both the Assembly’s and Parliament’s sifting committees would be making recommendations on the appropriate procedure.</p>

Recommendation	Response
<p>Recommendation 3. We recommend that the sifting criteria set out in paragraph 35(b) of this report are applied to all regulations that are made under the Bill and are laid before the National Assembly, and that the criteria should be set out in the Standing Orders of the National Assembly</p>	<p>REJECT: The Welsh Government recognises that the sifting committee will need to agree criteria by which it performs the sifting process. However, these criteria will need to be consistent with the final framework for the sifting mechanism, and the Assembly needs to maintain some flexibility in this regard. The Welsh Government is therefore not persuaded that the criteria should be included in Standing Orders.</p>
<p>Recommendation 4. We recommend that the Bill is amended in line with paragraphs 44 to 46 of this report, which include endorsements of recommendations made by the House of Lords Constitution Committee and the House of Lords Delegated Powers and Regulatory Reform Committee.</p> <p>The amendments proposed at paragraphs 44-46 are:</p> <ul style="list-style-type: none"> • That the affirmative procedure should apply to any measure which involves the making of policy • That the affirmative procedure should apply to regulations made under clauses 7, 8, 9 and 17 that amend or repeal primary legislation 46 • That the Government of Wales Act 2006 should be included in the list of enactments in clause 7(7) that cannot be amended by regulations 	<p>AGREE: The Welsh Government believes, in respect of the provisions relating to the exercise and scrutiny of delegated powers, that the powers and duties on Welsh Ministers should be in line with those which apply to UK Ministers. We are supportive of the EUW Bill being amended in the way proposed by CLAC (paragraphs 44-46).</p>
<p>Recommendation 5. We recommend that this Committee—the Constitutional and Legislative Affairs Committee—should be the sifting committee for the National Assembly for Wales and that the Assembly’s Standing Orders are amended accordingly.</p>	<p>AGREE IN PRINCIPLE: This is a matter for the Assembly. The Welsh Government agrees it would be appropriate for CLAC to assume this function. However, we do not believe it is necessary for Standing Orders to be amended to reflect this.</p>
<p>Recommendation 6. We recommend that the sifting mechanism should apply to regulations under Categories 1, 2 and 3 identified in this report, namely all regulations made under the Bill containing devolved provisions that are laid before the National Assembly.</p> <ul style="list-style-type: none"> • Category 1: regulations made by the Welsh Ministers acting alone using their powers under Schedule 2, laid 	<p>AGREE: The Welsh Government agrees that the sifting mechanism should apply to the categories of regulations set out by CLAC, although it notes the potential logistical challenges in respect of joint and concurrent regulations, where both the National Assembly and Parliamentary sifting committees will be considering the same set of regulations.</p>

Recommendation	Response
<p>before the National Assembly for Wales only;</p> <ul style="list-style-type: none"> • Category 2: regulations made by the Welsh Ministers and UK Ministers acting jointly under Schedule 2, laid before both the National Assembly for Wales and the UK Parliament; • Category 3: regulations made by the Welsh Ministers and UK Ministers using their concurrent powers (under Schedule 2 and clauses 7, 8 and 9, respectively) in composite regulations, laid before both the National Assembly for Wales and the UK Parliament; • Category 4: regulations made by UK Ministers acting alone using their powers under clauses 7, 8, 9 and 17, laid before the UK Parliament only. 	
<p>Recommendation 7. We recommend that the made affirmative procedure for urgent cases should also apply to regulations made by the Welsh Ministers (whether acting alone or acting with UK Ministers in composite regulations or acting with UK Ministers in joint regulations) in order for there to be consistent treatment of ministers of all governments.</p>	<p>AGREE: The Welsh Government believes that the made-affirmative procedures for urgent cases should be available in respect of regulations made by Welsh Ministers, to match the flexibility available to UK Ministers, and consistent with the principle of consistent treatment of ministers of all governments.</p>